

DOCUMENT RESUME

ED 141 849

CS 501 743

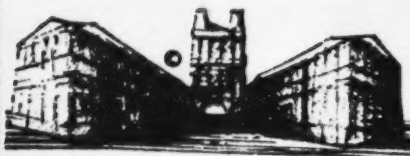
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TITLE The Commercial Speech Doctrine.
INSTITUTION Freedom of Information Center, Columbia, Mo.
REPORT NO FOI-372
PUB DATE May 77
NOTE 7p.

EDRS PRICE MF-\$0.83 HC-\$1.67 Plus Postage.
DESCRIPTORS *Constitutional Law; *Court Cases; *Court Litigation;
*Freedom of Speech; *Information Dissemination;
*Supreme Court Litigation
IDENTIFIERS *Advertising; Freedom of Information

ABSTRACT

In its 1942 ruling in the "Valentine vs. Christensen" case, the Supreme Court established the doctrine that commercial speech is not protected by the First Amendment. In 1975, in the "Bigelow vs. Virginia" case, the Supreme Court took a decisive step toward abrogating that doctrine, by ruling that advertising is not stripped of all First Amendment protection. This report outlines the legal status of commercial speech, from the Christensen case to the present. The report discusses the considerations in the Christensen case, definitions of commercial speech in subsequent cases, and decisions in the lower courts, which have ranged from affording no protection to commercial speech to affording full protection. Other sections report on Supreme Court decisions between 1942 and 1975 that demonstrate inconsistency regarding First Amendment protection for commercial speech, describe the issues in the Bigelow case, and analyze the status of protection for commercial speech since the Bigelow decision. (GW)

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May, 1977

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FREEDOM OF INFORMATION CENTER REPORT NO. 372

THE COMMERCIAL SPEECH DOCTRINE

This report was written by Barbara F. Luebke, an instructor and doctoral candidate at the University of Missouri School of Journalism.

Lewis Valentine only had wanted to advertise that he had a submarine persons could tour.

The Women's Pavillion only had wanted to advertise an abortion referral service.

In the first instance, an ordinance controlling the method by which Valentine chose to advertise was ruled legal by the U.S. Supreme Court. The doctrine of commercial speech was born; handbills were outside the protection of the First Amendment.

Thirty-three years later, the doctrine was modified. A statute prohibiting the abortion ad was ruled unconstitutional. Today, at least some commercial speech is protected by the First Amendment.

Between 1942 and 1975, those concerned about the status of commercial speech in the United States found themselves on a theoretical see-saw. Lower court interpretations ranged from acknowledging no constitutional protection for commercial speech to according it full protection. The Supreme Court was of little help; it seldom confronted the issue head-on and it generally failed to clarify its original ruling. It may be that in its 1975 ruling, the court went further than ever toward "rejecting the theory that commercial advertisements [are] not entitled to the same constitutional privilege as news articles and editorial."¹ But not everyone is convinced that is so.

A Precedent Is Set

All but First Amendment absolutists accept that some forms of speech, e.g. obscenity, libel, fighting words, are outside the protection of the constitution. In *Valentine v. Chrestensen*,² the U.S. Supreme Court, for the first time, concluded that commercial speech also fell into the category of unprotected speech. In doing so, the court was indicating an acceptance of the Meiklejohnian view of free speech, which gives "primacy to the nation's political dialogue."³ Meiklejohn, arguing that the First Amendment's total concern is with speech that affects the political process, relegates commercial speech to the protection

of the Fifth Amendment.⁴ The traditional arguments have been that: (1) Commercial speech is for economic gain and has little to do with the free flow of ideas; (2) Commercial speech generally does not prompt discussion; (3) Commercial advertising is only one facet of economic enterprise, which the state already broadly regulates.⁵ This reasoning appears again and again in court decisions. For example, in 1968, a federal appeals court wrote:

Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices.⁶

Commentators subsequently suggested that the *Chrestensen* ruling that established the doctrine of commercial speech was without precedent, "historical evidence or policy considerations."⁷ One member of the 1942 court described the ruling as "casual, almost offhand;"⁸ nevertheless, at least on paper, commercial speech was read out of the First Amendment.

The year was 1942. Lewis J. Valentine of Florida owned an old Navy submarine that he had moored in New York City's East River. He prepared a handbill to advertise that the submarine was open to the public. In attempting to distribute his flyers on city streets, however, he was told this action violated a section of the city's sanitary code. The code prohibited distribution of commercial and business advertising matter. Valentine was told he could distribute handbills containing only "information or a public protest."⁹ He revised his original. On one side he included the information from the first handbill, minus fee statement; on the opposite side he added a protest against the city dock department for refusing him wharf facilities at a city pier. He again was restrained by police and was told he was in violation of the code. On appeal, the U.S. Supreme Court was asked

Summary:

The author reports on the legal status of commercial speech, from the Supreme Court's 1942 ruling in the *Chrestensen* case, to the 1975 *Bigelow* decision. The report indicates confusion and inconsistency in the courts, marked by rulings which have ranged from acknowledging no constitutional protection, to those according full First Amendment protection.

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to decide whether the ordinance was an unconstitutional abridgment of Valentine's First Amendment rights. In a brief opinion, the court wrote:

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.¹⁰

Did it make a difference that one-half of Valentine's handbill contained material that, alone, was legal under the ordinance? The court found that

... the affixing of the protest ... was with the intent and for the purpose of evading the prohibition. ... If that evasion were successful every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.¹¹

Thus it was that handbills, whose primary purpose was commercial, were declared unprotected by the First Amendment. The court made no attempt to define commercial advertising; the meaning of the words seemed to be taken for granted. And that ultimately—and not surprisingly—created problems.

[J]ust as the Court has had an arduous task isolating obscenity from protected forms of expression, the burden of separating the commercial from the traditionally protected categories of speech has been onerous.¹²

A number of considerations emerge, although "(i)n the area of commercial speech the judiciary has generally ignored the problem" of definition.¹³

—Decisions subsequent to *Chrestensen* indicated that commercial speech must include at least the "proposal of a transaction for profit."¹⁴

—In *New York Times v. Sullivan*,¹⁵ the court outlined what commercial speech was NOT:

The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.¹⁶

—It generally seems to be assumed that noncommercial speech contains controversial ideas and commercial speech does not.¹⁷

—The purpose of the speech also is considered. If the activity classified as speech is conducted to communicate information or disseminate opinion, it is offered the fullest protection of the First Amend-

ment. . . . The distinction as to what separates "purely commercial advertisement" from this type of case is that, in the former, the expression is used, not to disseminate opinion or communicate information, but to sell a product or service.¹⁸

—Such "pure" commercial speech is defined further as

communication concerned solely with promoting the sale of commercial services or products, which services or products are themselves not speech traditionally protected by the first amendment.¹⁹

Commercial Speech in the Lower Courts

The difficulties inherent in the commercial speech doctrine are perhaps most evident at the lower court level, where interpretation has been acknowledged to only have confused the issue.²⁰ Decisions have ranged from affording no protection or less protection than other speech, to full protection. At least two commentators, however, conclude that

[t]he great majority of cases . . . adopt an approach similar to the *Chrestensen* decision, denying protection to the specific commercial matter before the court without attempting to meet the broader issue.²¹

They add that

[t]he questions raised by *Chrestensen* remain largely unasked, let alone answered, and in most cases there is no attempt to define either the scope or rationale of the distinction between commercial and noncommercial speech.²²

Another analyst suggests the doctrine often was misused by the lower courts, specifically in false advertising cases (where it was unnecessary) and in cases involving ads for obscene or illegal activities, credit or business reports, and even hooks on mailboxes and topless dancing.²³

The primary problems created by the application of the doctrine in these cases is that the concept of commercial speech loses any boundaries it once had while other less constitutionally troublesome regulatory justifications are overlooked.²⁴

It also has been suggested that the

. . . lack of consistent development in the doctrine may be attributed, at least in part, to the Supreme Court's relative silence on the commercial speech question.²⁵

Statements from several post-*Chrestensen* decisions demonstrate the range of judicial interpretation in the lower courts:

—In *SEC v. Texas Gulf Sulphur Co.*,²⁶ the 2nd Court of Appeals was blunt: ". . . the First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech."²⁷

—The federal district court for the western district of Virginia was equally as sure that commercial speech was unprotected: "Regulation of commercial advertising does not intrude upon First Amendment rights of free speech."²⁸

—And a district judge for the eastern district of Wisconsin, in 1973, acknowledged some problems, but de-

cided that

[d]espite the conceptual difficulties in articulating a test to distinguish commercial from non-commercial expression, the decision to deny protection to commercial expression reflects the Supreme Court's sound judgment about the function of the First Amendment.²⁹

—In the 1960s, a number of lower courts gave some First Amendment protection to commercial speech. At issue were attempts by antiwar groups to place their posters in public places. For instance, in 1967, SDS members in New York City alleged that they were deprived of their constitutional rights when transit authorities and an advertising company refused their antiwar posters for subway stations.³⁰ A federal district court ruled that

absent a showing that the posters would present a "clear and present" danger, the guarantee of freedom of speech under the First and Fourteenth Amendments extends to plaintiffs' posters. . . .³¹

—In 1969, the California Supreme Court affirmed a superior court decision that refusal by buses to accept an advertisement from Women for Peace was in violation of the First Amendment.³² The Contra Costa Transit District's policy was to accept only "commercial advertising for the sale of goods and services" and for political candidates at election time.³³ Wrote the court:

At the threshold we emphasize that the content of the advertising in question is undeniably protected by the First Amendment. . . . The fact that the message is proposed as a paid advertisement does not detract from the protection afforded.³⁴

It admitted "a long line of decisions has established the rule that commercial messages do not come within the orbit of the First Amendment."³⁵ But it reasoned that the district's policy "reverses [the] acceptable priorities and gives preference to commercial advertising over non-mercantile messages."³⁶ And the "paradoxical scope" of the policy bothered the court, which cited a litany of possibilities, e.g.

. . . a theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films.³⁷

—In a decision shortly thereafter, the Washington Supreme Court declared the reasoning of the previous two cases "sound and applicable to the present case."³⁸ A church committee, in 1969, had contracted with the city of Tacoma for display of 20 exterior antiwar signs on buses. The city manager ordered the signs removed. The trial court enjoined the defendants from interfering with performance of the contract, and the state supreme court affirmed. In a concurring decision, Judge Finley, noting the subjectivity of deciding what kinds of ads could be rejected by the city, added,

While such a criterion [advertising "objectionable to the city"] may be enforceable as to material unprotected by the First Amendment, such a criterion fails for vagueness in the face of the values embodied in and protected by the First Amendment.³⁹

Although unstated, the assumption obviously was that these

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bus/posters were not commercial advertising in the *Chres-tensen* sense.⁴⁰

—A federal district court in Michigan also saw at least some protection for some kinds of commercial speech. In a 1972 decision, it struck down a Royal Oak ordinance that prohibited advertising how an abortion could be obtained. The court wrote:

Clearly the City of Royal Oak has insufficient interest in an abortion to be performed in another state to warrant the limitation of speech. . . . The ordinance in question is neither so sufficiently direct nor narrow that it can withstand the requirements of the First Amendment.⁴¹

—In a concurring opinion in a 1970 case, a federal district judge in California also found reason to believe there is some protection for commercial speech.⁴²

The degree to which the First Amendment applies to protect speech varies with society's interest in the content of that speech. . . . The commercial element does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales.⁴³

—In upholding an FCC order that broadcasters carrying cigarette commercials must provide time for anti-cigarette messages, a federal appeals court wrote:

The speech which might conceivably be "chilled" by this ruling barely qualifies as constitutionally protected "speech". . . . [E]ven if cigarette commercials are protected speech, we think they are at best a negligible "part of any exposition of ideas, and are of . . . slight social value as a step to truth. . . ."⁴⁴

—"Even advertisers enjoy first amendment rights," the district court for the District of Columbia noted in 1973.⁴⁵ It tempered its statement, however, by adding that "product advertising is 'less vigorously protected . . . than other forms of speech.'"⁴⁶

—A couple of courts disagreed. In a consolidated appeal, the California Supreme Court reversed convictions of persons who had advertised abortion information. In their decision, the justices noted:

The rights of freedom of speech and freedom of the press are not removed from the protection of the First Amendment because they are transmitted in a commercial setting or for profit. A person is as much entitled to the protection of the First Amendment when the speech he utters or prints is for profit as when it is expressed altruistically.⁴⁷

—Full protection also was accorded commercial speech in a case decided by a federal appeals court. In *United States v. Pellegrino*,⁴⁸ the court overturned the defendant's conviction for mailing obscene advertisements. The court found that the brochure in question was not obscene and noted,

We cannot agree with the Government that advertising is devoid of literary, artistic or other social

value and accordingly is necessarily less deserving of First Amendment protection than the substance of that which is advertised.⁴⁹

In sum, then,

If any common "doctrine" can be drawn from the majority of these lower court cases, it is not that commercial speech is totally outside the protection of the First Amendment . . . but only that commercial speech is entitled to less protection than other types of speech. . . . [T]he exact degree of protection has not been defined. In most cases, the axiom is simply stated in support of the court's own denial of protection in the particular case and followed by citation to *Valentine v. Chrestensen*.⁵⁰

The Doctrine in the Supreme Court

If the degree of First Amendment protection accorded commercial speech was confusing in the lower courts, the highest court in the land did little to help the situation. Even the 1975 *Bigelow* decision, which at least acknowledges protection for "advertisements,"⁵¹ did not outline "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."⁵² Between *Chrestensen* and *Bigelow*, furthermore, there was a general void as the commercial speech doctrine "lapsed into a tenuous half-life in the footnotes of the Supreme Court."⁵³

After *Chrestensen*, the commercial speech doctrine was applied in several religious pamphleteering cases. In *Jones v. Opelika*,⁵⁴ the court decided that a state could tax the use of ordinary commercial methods of sales by religious groups. A year later, in *Jamison v. Texas*,⁵⁵ the court ruled that the state could not prevent distribution of handbills seeking money for religious purposes. Finally, in *Murdock v. Pennsylvania*,⁵⁶ noting that drawing the line between commercial and noncommercial could be difficult, the court stated:

[T]he mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. . . . The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills.⁵⁷

That decision both reaffirmed the commercial speech doctrine of *Chrestensen* and warned that it was not to be extended beyond the handbill context. It also

refuted the simplistic argument that a mere sale in connection with the exercise of First Amendment rights converts these activities into commercial conduct within the state's regulatory power.⁵⁸

Three cases can be cited in which the U.S. Supreme Court did confront the *Chrestensen* doctrine head-on. The first was the famed 1964 libel case, *New York Times v. Sullivan*.⁵⁹ In what is seen as the clearest statement to that time of the commercial speech doctrine, the court outrightly dismissed the argument that the First Amendment did not apply because the allegedly libelous statements were part of a paid advertisement. Utilizing a content-

analysis approach, the court emphasized the differences between the "purely commercial advertising" of Valentine's handbills and the editorial matter of "highest public concern and interest" in the ad in the *Times*.

That the *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. . . . [I]f the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.⁶⁰

With this decision, then, the court "began to erode the commercial speech doctrine," refusing to apply a primary purpose test and shifting emphasis "from weighing motives to ascertaining the advertisement's informational value."⁶¹

Further indication of a shifting view was apparent in a dissent by Justice Douglas, a member of the 1942 *Chrestensen* court. He declared in 1971 that the decision was

. . . ill-conceived and has not weathered subsequent scrutiny. . . . Surely we have eroded [it] to the extent that it held a commercial form of publication negated the applicability of the First Amendment. Nor, in my view, should commercial content be controlling. The language of the First Amendment does not except speech directed at private economic decision making. Certainly such speech could not be regarded as less important than political expression.⁶²

But a 1973 decision seemed to signal a return by the court to the strict commercial speech rule of *Chrestensen*. In *Pittsburgh Press v. Pittsburgh Commission on Human Rights*,⁶³ the court upheld (5-4) a commission order forbidding separate male and female help-wanted listings in classified ads. The court's decision was based primarily on the assumption that the classified ads involved were commercial speech, and thus could be regulated by the state.

In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the [*Times*] advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.⁶⁴

And as such, the court concluded, the advertisements were not protected speech under the First Amendment; the commission's regulations were within its jurisdiction and did not violate the newspaper's constitutional rights. The court's decision, however, was interpreted as more narrowly drawn than *Chrestensen*. It has been suggested that the court implied three guidelines for narrowing future applications of the doctrine: (1) institutional or financial threat to the press; (2) editorial judgment of the press; (3) "legal" commercial activity.⁶⁵ In other words:

1. "The implication is that if such [an economic] threat or impairment could be shown, it could render unconstitutional an otherwise valid regulation of commercial speech."⁶⁶

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2. While the court found minimal editorial judgment involved in which column heading an advertiser chose, it reaffirmed "unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."⁶⁷

3. Where the economic activity involved is not illegal, it seems that First Amendment interests might be found to outweigh the state's interests in regulation. But, "[d]iscrimination in employment is not only commercial activity, it is illegal commercial activity. . . ."⁶⁸

In dissenting opinions in the *Pittsburgh Press* case: Justice Burger said the commission's actions amounted to prior restraint on free speech. Further, he wrote,

Assuming, *arguendo*, that the First Amendment permits the states to place restrictions on the content of commercial advertisements, I would not charge that power to reach the layout and organizational decisions of a newspaper.⁶⁹

Justice Douglas reiterated his position that commercial speech has First Amendment protection; and Justices Stewart and Blackmun said no agency can tell a newspaper in advance what it can or cannot print, even on its advertising pages.⁷⁰

A New Precedent Is Set

In the third instance in which the court squarely confronted the commercial speech doctrine, it took "... a decisive step toward the abrogation" of it.⁷¹ In a 7-2 decision written in 1975 by Justice Blackmun, the court dismissed the *Chrestensen* holding as a "distinctly limited one. . . . The case obviously does not support any sweeping proposition that advertising is unprotected per se."⁷²

The new precedent-setting case was *Bigelow v. Virginia*.⁷³ Jeffrey Cole Bigelow, managing editor of a weekly newspaper in Virginia, had published a New York City group's advertisement announcing low-cost abortions in New York, where they then were legal.

UNWANTED PREGNANCY. LET US HELP YOU. Abortions are now legal in New York. There are no residency requirements. **FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST,** Contact WOMEN'S PAVILLION, 515 Madison Ave. New York, N.Y. 10022, or call any time (212)371-6670 or (212)371-6650. **CALL SEVEN DAYS A WEEK. STRICTLY CONFIDENTIAL.** We will make all the arrangements for you and help you with information and counseling.

Under a Virginia statute, it was a misdemeanor to encourage or prompt the processing of an abortion by way of the sale or circulation of any publication. The County Court for Albemarle County rejected Bigelow's claim that the statute was unconstitutional, and the state supreme court affirmed that decision. Its central assumption was, of course, that First Amendment guarantees did not apply to paid commercial advertisements.

The U.S. Supreme Court disagreed. It detailed three aspects of the advertisement in question that made it different from purely commercial advertisements: (1) It contained "factual material of clear 'public interest.' Portions of its message, most prominently the lines, 'Abortions are now legal in New York. There are no residency re-

communicating information and disseminating opinion."⁷⁴ (2) The activity advertised "pertained to constitutional interests."⁷⁵ (3) The activity was legal in New York.

The court, in applying its balancing test, found that the public's interests in the speech outweighed the state's interest in regulating it. Further, it said,

To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.⁷⁶

In dissenting opinions, Justices Rehnquist and White were reluctant to view the advertisement as anything but a commercial message.

As a threshold matter the advertisement appears . . . to be a classic commercial proposition directed toward the exchange of services rather than the exchange of ideas. . . . Whatever factual content the advertisement may contain and whatever expression of opinion may be laboriously drawn from it does not alter its predominantly commercial content.⁷⁷

What Does It All Mean?

The lack of free speech status for commercial speech has struck many as "ironic in a society that places such high value on the business ethic and for a Supreme Court that has traditionally been so sensitive to property rights."⁷⁸ For example, in April, 1974, the board of directors of the American Civil Liberties Union adopted this policy statement:

The distinction between commercial and non-commercial speech has no value for deciding when First Amendment protection should be afforded and where some restraints are justified. The First Amendment applies to both kinds of speech.⁷⁹

The logical question after *Bigelow* is: How far has the court gone toward granting free speech status to commercial speech? Analysis of the decision has been extensive—at least on the part of the legal experts. And they do not seem to see *Bigelow* as the panacea commercial speech advocates might hope. Instead,

[t]he Court's focus on the text of the advertisement . . . bodes ill for efforts . . . to find theoretical justifications for protection of commercial speech. . . . [Bigelow's] real emphasis is on non-commercial speech in a commercial context. This approach, and the Court's concentration on the text of the advertisement, will necessarily limit its impact. The revival of the "public interest" test, although a potential tool for broadening Bigelow's scope, may not have that effect in practice. . . . Bigelow's "reasonable regulation" standard may actually result in less protection for some commercial advertising. . . . The standard could also encourage arguments proposing the regulation of

speech now protected by the first amendment. If traditionally protected speech could be shown to have a commercial aspect, the standard for first amendment protection might be lowered to the "reasonable regulation" standard.⁸⁰

There is another problem with the content-analysis approach utilized in *Bigelow*. It puts a newspaper editor

in the position of having to make an independent judgment of whether a given advertisement constitutes merely "commercial speech" or an expression protected by the First Amendment.⁸¹

A wrong decision, quite obviously, could be costly. It also has been suggested that the approach

seems ill-suited to judge such fundamental freedoms as freedom of speech and freedom of the press. . . . [I]t satisfies neither the Court nor those looking to the Court for standards to indulge in a

word-by-word, line-by-line analysis of an advertisement in order to find a phrase which might justify First Amendment protection.⁸²

Others note that the *Bigelow* decision can be interpreted to be "merely the reversal of one man's conviction."⁸³ The statute in question in the case no longer is in effect, and since "the Court failed to apply the 1972 amendment to this case, one could claim that no grounding for a precedent was set."⁸⁴ This same writer, however, also suggests

{a} further and more liberal interpretation . . . is that [Bigelow] implies that any advertisement could obtain first amendment protection by including a statement which would be of public interest.⁸⁵

But there are also those who read the decision as a giant step forward. As one analyst sees it:

Regardless of the label, commercial speech is now entitled to constitutional protection unless the state can bear the burden of showing a legitimate public interest sufficient to permit its regulation.⁸⁶

FOOTNOTES

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3. Franklin S. Haiman, "How Much of Our Speech Is Free," *Civil Liberties Review*, Vol. 2, No. 1, p. 127.
4. Martin H. Redish, "The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression," *The George Washington Law Review*, Vol. 39, No. 3 (March, 1971), p. 436.
5. Constance G. Jackson, "Comments," *University of Cincinnati Law Review*, Vol. 44, No. 4 (1975), pp. 857-8.
6. *Banzhaf v. F.C.C.*, 405 F. 2d 1082 (1968) at 1101-2.
7. David Sheridan, "Commercial Speech: The Supreme Court Sends Another Valentine to Advertisers," *Buffalo Law Review*, Vol. 23, No. 3 (Spring, 1976), p. 739 and Redish, "Marketplace," p. 450.
8. *Cammarano v. United States*, 358 U.S. 498, 3 L. Ed. 2d. 462 (1942) at 472.
9. 86 L. Ed. 1262 at 1264-65.
10. *Ibid.* at 1265.
11. *Ibid.* at 1265-66.
12. Redish, "Marketplace," p. 431.
13. *Ibid.*
14. Sheridan, "Another Valentine," p. 739.
15. *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964).
16. *Ibid.* at 698.
17. Haiman, "How Much," p. 129.
18. *Hodges v. Fitts*, 332 F. Supp. 504 (1971) at 509.
19. Redish, "Marketplace," p. 432.
20. Bill Aitchison, "The Right to Receive and the Commercial Speech Doctrines: New Constitutional Considerations," *The Georgetown Law Journal*, Vol. 63, No. 3 (February, 1975), p. 797. Especially note footnote 132.
21. P. Cameron DeVore and Marshall J. Nelson, "Commercial Speech and Paid Access to the Press," *The Hastings Law Journal*, Vol. 26, No. 3 (January, 1975), p. 749.
22. *Ibid.*
23. Aitchison, "New Considerations," p. 798.
24. *Ibid.*
25. DeVore and Nelson, "Commercial Speech," p. 755.
26. *SEC v. Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (1971).
27. *Ibid.* at 1306.
28. *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (1969) at 825.
29. *Holiday Magic, Inc. v. Warren*, 357 F. Supp. 20 (1973).
30. *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (1967).
31. *Ibid.*, 442.
32. *Wirtz v. Alameda-Contr Costa Transit District*, 434 P. 2d 982 (1968).
33. *Ibid.*, 984.
34. *Ibid.*
35. *Ibid.*, 986.
36. *Ibid.*
37. *Ibid.*
38. *Hillside Community Church, Inc. v. City of Tacoma*, 455 P. 2d 350 (1969) at 354.

39. *Ibid.*, 355.
40. *Ibid.*, 356, footnotes 1 and 3.
41. *Mitchell Family Planning, Inc. v. City of Royal Oak*, 335 F. Supp. 738 (1972) at 743.
42. *Rowan v. United States Post Office Department*, 300 F. Supp. 1036 (1969).
43. *Ibid.* at 1044.
44. 405 F. 2d 1082 at 1101-2.
45. DeVore and Nelson, "Commercial Speech," p. 752.
46. *Ibid.*
47. *People v. Orser*, 31 C.A. 3d 528 (1973) at 535.
48. *United States v. Pellegrino*, 467 F. 2d 41 (1972).
49. *Ibid.* at 45.
50. DeVore and Nelson, "Commercial Speech," pp. 754-55.
51. *Ibid.*, p. 763.
52. *Bigelow v. Virginia*, 421 U.S. 809, 44 L. Ed. 2d 600 (1975) at 613.
53. DeVore and Nelson, "Commercial Speech," p. 753.
54. *Jones v. Opelika*, 316 U.S. 584 (1942).
55. *Jamison v. Texas*, 318 U.S. 413 (1943).
56. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).
57. *Ibid.* at 111.
58. DeVore and Nelson, "Commercial Speech," p. 756.
59. 11 L. Ed. 2d 686.
60. *Ibid.* at 698.
61. Jackson, "Comments," pp. 854-55.
62. *Dunn v. Grove*, 404 U.S. 898, 30 L. Ed. 2d 175 at 178.
63. *Pittsburgh Press v. Pittsburgh Commission on Human Rights*, 413 U.S. 376 (1973).
64. *Ibid.* at 385.
65. DeVore and Nelson, "Commercial Speech," pp. 760-3.
66. *Ibid.*, 760.
67. 413 U.S. at 391.
68. *Ibid.* at 388.
69. *Ibid.* at 393.
70. *Ibid.* at 393-404.
71. Jackson, "Comments," p. 859.
72. 44 L. Ed. 2d at 610.
73. *Ibid.* at 600.
74. *Ibid.* at 612.
75. Sheridan, "Another Valentine," p. 822.
76. 44 L. Ed. 2d at 614.
77. *Ibid.* at 617.
78. Haiman, "How Much," p. 127.
79. *Ibid.*, p. 131.
80. Sheridan, "Another Valentine," pp. 750-1.
81. James E. Towerly, "Comments," *Emory Law Journal*, Vol. 24, No. 4 (Fall, 1975), p. 1187.
82. *Ibid.*
83. Ellen S. Podgor, "Recent Development," *Indiana Law Review*, Vol. 8, No. 5 (1975), p. 895.
84. *Ibid.*
85. *Ibid.*, p. 896.
86. Jackson, "Comments," p. 859.